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No. 1042

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

RICHARD LEE BUONOMO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM FOR PETITIONER

MELVIN B. LEWIS
30 North LaSalle Street
Chicago, Illinois 60602
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

In resisting our petition, the government makes two essential contentions.

First, the government states, "The Court had the power to impose a federal sentence that would commence only upon completion of a State sentence. See *Williams* v. *Taylor*, 327 F.2d 322 (C.A. 10), certiorari denied, 377 U.S. 1002." (Government memorandum, p. 3)

That argument misses the entire point of the case. As the court in *Williams* took pains to point out, deferred commencement of a federal sentence is authorized

only "when a state surrenders one of its prisoners to the federal government for the purpose of trial . . . [and] if the prisoner is delivered back to state authorities . . ." 237 F.2d 323. Our petition sought to point out the distinction between the *Williams* situation, and the case at bar. Here, when the defendant received his federal sentence, he was *not* in state custody and might well never have undergone state custody. He was not "returned" to state custody; he was confined in federal detention, and obviously could not have been "returned" to a status he had never held. The failure of the government to apprehend those distinctions from our petition, may be due to the deficiencies of the petition itself. But *Williams* states the proposition very clearly.

The government further contends that at the time of sentencing, the trial court "inadvertently failed to make specific provision for the two-day hiatus before the State sentence took effect" (Government Memorandum Pg. 4). If there is any inadvertence, it is that of the government. The trial court made a very specific provision for the "two-day hiatus". It ordered that no such hiatus should occur, and that the defendant be taken into immediate custody to commence service of the federal sentence.

The government attempts to define the issue in terms of *Bozza* v. *United States,* 330 U.S. 160, 167, and *Orrie* v. *United States,* 302 F.2d 685 (Government Memorandum Pg. 4). But both those cases involve correction of sentences which had been less than the statutory minimum. That, under Rule 35, may be done at any time.

Finding no authority for the trial court's unprecedented action, the government speaks of "inherent power—under Rule 35 or otherwise . . ." (Government Memorandum Pg. 5). The self-contradictory and meaningless argu-

ment thus asserted, serves eloquently to demonstrate that the action taken below "has so far departed from the accepted and usual course of proceedings . . . as to call for an exercise of this court's power of supervision". (United States Supreme Court Rule 19 (b).)

We agree with the government that this is not "a game". (Government Memorandum Pg. 4). It is a clear case of constitutional violation. The government contends, essentially, that the Constitution was violated only slightly, and that nobody was hurt. Constitutional departures are frequently considered in some quarters to be defensible when they are slight departures. If petitioner's lawful sentence could be effectively increased after one day of service, there is no earthly reason why it cannot be done after one year of service.

Like other protections, the safeguards of the Fifth Amendment will be either absolute or whimsical. We should regret, deeply, any contribution to the erosion of that safeguard. We pray that your Honors will not permit it to happen.

Respectfully submitted,

MELVIN B. LEWIS
Attorney for Petitioner